COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Quick, 2016 ONCA 95

DATE: 20160202

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Laskin, Gillese and van Rensburg JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Marc Ross Quick

Appellant

Breese Davies and Owen Goddard, for the appellant

Roger Shallow, for the respondent

Heard: June 17, 2015

On appeal from the conviction entered on April 15, 2010 by Justice Guy F. DeMarco of the Ontario Court of Justice.

Laskin J.A.:

A. Overview

[1] The appellant Marc Quick pleaded guilty to criminal harassment, breach of a court order, and dangerous driving. On his appeal, we must decide whether to quash his conviction for dangerous driving on the ground that, when he pleaded guilty to that charge, he did not understand that his driver's licence would be indefinitely suspended.

[2] The charges against Quick arose out of an incident in which he repeatedly drove his car too close to a car in which his ex-girlfriend was a passenger and

her new boyfriend was the driver. After a judicial pre-trial, Quick's counsel told him that if he pleaded guilty to the three charges, the Crown would seek a reformatory term and probation and would withdraw other charges against him. Quick's counsel also told him that he would lose his driver's licence for one year. Quick decided to plead guilty and he was convicted on the three charges.

[3] Quick's counsel, however, had not told him that because he had two previous drinking and driving convictions, his driver's licence would be suspended indefinitely under the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (*HTA*). In an affidavit filed as fresh evidence, Quick said that had he known his driver's licence would be suspended indefinitely, he would not have pleaded guilty; he would have asked for a trial.

[4] To be valid, a guilty plea must be voluntary, unequivocal, and informed. Quick admits that his guilty plea was voluntary and unequivocal. This appeal turns on whether his plea was informed. For an accused's plea to be informed, the accused must be aware of the nature of the allegations and the effect and consequences of the plea: see *R. v. T.(R.)* (1992), 10 O.R. (3d) 514 (C.A.). The requirement that a guilty plea be informed gives rise to three issues on this appeal:

> 1. Did Quick understand the *HTA* consequences of his guilty plea from his previous convictions and from the court clerk's caution when he pleaded guilty?
>
> 2. If the answer to the first question is "no", did Quick have to understand the *HTA* consequences of his guilty plea for his plea to be informed?
>
> 3. If Quick succeeds on the first two issues, should this court quash all three convictions or only the conviction for dangerous driving?

I would answer "no" to the first question, "yes" to the second question, and quash only the conviction for dangerous driving.

B. Background

1. History of the proceedings

[5] The incident giving rise to the dangerous driving charge against Quick occurred in December 2009. He pleaded guilty on April 10, 2010; as I will discuss, this date is significant for the operation of the *HTA* suspension. On his plea, Quick was found guilty of dangerous driving, criminal harassment, and breach of a court order. He was sentenced to six months' imprisonment and

three years' probation (in addition to three months of pre-sentence custody credited on a two-for-one basis) on the dangerous driving conviction, and six months' imprisonment on each of the other two convictions, to be served concurrently. The sentencing judge did not impose any driving suspension under the *Criminal Code*, R.S.C. 1985, c. C-46.

[6] In May 2010, Quick filed an inmate notice of appeal. He said that he was appealing his conviction for dangerous driving. Several months later, however, he abandoned his appeal. Quick's appeal was later restored and was heard by a panel of this court in November 2014. In a brief endorsement, the panel concluded that it would not be in the interests of justice to consider the validity of the plea to dangerous driving in isolation: see *R. v. Quick*, 2014 ONCA 771. The plea to dangerous driving was "part of a plea bargain", which included pleas to criminal harassment and disobedience of a court order and a stay of other charges. The panel dismissed Quick's application but without prejudice to his right to apply to set aside all three convictions.

[7] Quick then filed an amended notice of appeal, challenging all three convictions. On this appeal, he has filed as fresh evidence both his own affidavit and the affidavit of his trial counsel. Both Quick and his counsel have been cross-examined. Both sides accept that the fresh evidence is admissible. It is in the interests of justice to admit the fresh evidence because it is needed to fairly decide the appeal.

2. Quick's previous convictions and the suspension under the *HTA*

[8] On September 26, 1997, Quick was convicted of driving over 80. And on September 25, 2000, he was convicted of impaired driving. Under s. 41(1)(h) of the *HTA*, on a third conviction for a *Criminal Code* driving offence, a person's driver's licence is suspended indefinitely. Thus, once Quick pleaded guilty to dangerous driving in April 2010, he lost his driver's licence indefinitely. The indefinite suspension is automatic and mandatory, though it may be reduced to ten years if the person takes prescribed remedial programs.

[9] Section 41(3) of the *HTA*, however, contains a limitation period. The indefinite suspension does not apply when the later conviction is more than ten years after the previous conviction. Quick's previous conviction was on September 25, 2000. If he had pleaded guilty to dangerous driving on September 26, 2010, instead of on April 10, 2010, the indefinite suspension would not have come into effect.

C. Analysis

1. Did Quick understand the *HTA* consequences of his guilty plea from his previous driving offences and from the court clerk's caution?

[10] In her fresh evidence affidavit and on cross-examination, Quick's trial counsel admitted that she did not discuss with her client the *HTA* consequences of his pleading guilty. She merely told him that his licence would be suspended for one year.

[11] Quick also said that his lawyer never told him that his driver's licence would be suspended indefinitely. He first learned of the indefinite suspension after he had pleaded guilty.

[12] Despite this evidence, the Crown submits that Quick must have been or should have been aware that his driver's licence would be administratively suspended indefinitely under the *HTA* in either of two ways: from his previous driving convictions or from the court clerk's standard caution when he was arraigned on the dangerous driving charge. I do not accept the Crown's submission.

[13] Under s. 219(1) of the *HTA*, when an accused is arraigned on a driving offence, including dangerous driving, the court clerk is required to give the accused the following notice:

> *The Highway Traffic Act provides that upon conviction of the offence with which you are charged, in the circumstances indicated therein, your driver's licence shall be suspended for the period prescribed by statute*.

[14] In his cross-examination on his fresh evidence affidavit, Quick acknowledged that after his two previous drinking and driving offences, his licence had been suspended by the Ministry of Transportation, first for one year, and then for three years. And he acknowledged that he was given that standard caution before pleading guilty. But he thought this caution referred to the one-year suspension he had discussed with his counsel.

[15] I do not think that on this appeal we are in a position to disbelieve Quick. It seems reasonable for him to have relied on his lawyer's advice about the length of his driver's licence suspension. Although the mandatory administrative suspension of one's driver's licence under the *HTA* may generally be well known, I doubt that the provision for an indefinite suspension is well understood. On the

record before us, certainly Quick did not understand his licence would be suspended indefinitely. Thus, I conclude that Quick did not understand the *HTA* consequences of his guilty plea to dangerous driving.

2. Did Quick have to understand the *HTA* consequences of his guilty plea for his plea to be informed?

[16] This is the most important issue on this appeal. Quick submits that "the collateral consequences of a guilty plea, including driver's license suspensions under the *Highway Traffic Act*, are part of the 'consequences' of a plea an accused must understand before his plea will be valid." When an accused is unaware of these consequences in pleading guilty, the plea is uninformed. And to deny the accused a trial on the merits when the plea is uninformed would be a miscarriage of justice.

[17] The Crown, on the other hand, submits that the only "consequences" an accused must understand for the plea to be informed are the criminal consequences of the plea or the punishment. A failure to understand a provincially mandated suspension is a "civil" or "collateral" consequence, which will not invalidate a guilty plea to a *Criminal Code* offence. I generally agree with Quick's submission.

[18] For an offender, a plea of guilty will invariably have criminal consequences, the punishment for the offence. But a guilty plea may also have non-criminal consequences: for example, immigration consequences, employment consequences, a civil action for damages, or, as in this case, a provincially mandated suspension of one's driver's licence. The parties used the term collateral consequences for these non-criminal consequences and I will as well. The general question underlying this appeal is whether an accused's unawareness of a collateral consequence can render a guilty plea uninformed. On the specific collateral consequence in issue – an automatic licence suspension under provincial legislation – the cases go both ways.

[19] In Ontario, trial judges have come to different conclusions on whether an accused's unawareness of the length of an *HTA* licence suspension renders a guilty plea uninformed and invalidates the plea. The only provincial appellate court to consider the issue, the Court of Appeal of Alberta, has ruled against Quick's position.

[20] I begin with the Alberta case, *R. v. Slobodan* (1993), 135 A.R. 181 (C.A.). There, the appellant had pleaded guilty to dangerous driving causing bodily harm because her counsel told her that she would lose her driver's licence for a

maximum of three years. Although her sentence included only a one-year driving prohibition, the appellant faced an automatic five year licence suspension under that province's *Motor Vehicle Administration Act*, R.S.A. 1980, c. M-22, as amended by S.A. 1996, c. 29. She sought to change her plea because of the "unexpected additional two years loss of driving privileges": *Slobodan*, at para. 4. In a very brief judgment, the Court of Appeal of Alberta rejected the appellant's position, at para. 4: "An unexpected penalty dictated by law after a voluntary and *informed* plea of guilty does not now justify a change of plea" (emphasis added). Implicitly, the court held that an accused's unawareness of a provincially mandated licence suspension does not render the plea "uniformed". It is a collateral consequence and irrelevant to the validity of the plea.

[21] *Slobodan* has been followed in Ontario in *R. v. Sumbler*, [1997] O.J. No. 1953 (Gen. Div.), and *R. v. D.(B.)* (2009), 84 M.V.R. (5th) 39 (Ont. S.C.).

[22] But Glass J. in *R. v. Stewart* (2002), 33 M.V.R. (4th) 103 (Ont. S.C.), and McDermot J. in *R. v. Grewal*, 2011 ONSC 4288, took a different view.

[23] In *Stewart*, the accused pleaded guilty to impaired driving. The parties put forward a joint submission for a two-year licence suspension under the *Criminal Code*. But, as the accused had a previous driving conviction, his licence was automatically suspended for three years under the *HTA*. His lawyer had not told him about the provincial suspension, and the accused had been unaware of it. Glass J. held that the accused's plea was not informed. He wrote, at para. 14:

> I conclude that this information never came to the attention of Mr. Stewart. The statutory suspension is an integral part of the whole process when a person is concluding the prosecution of impaired driving offences. It is an empty victory to strike a deal with the Crown for a two year loss of driving privileges in court when in fact there will be an automatic three year loss under the provincial statute. Mr. Stewart entered his guilty plea uninformed and in effect not voluntarily because of his lack of information. His legal representative was a barrister who was governed by the Rules of Professional Conduct which require the lawyer to advise the client fully of the implications of a guilty plea and the possible consequences of that plea. That did not occur. A miscarriage of justice occurred and must be addressed.

[24] *Grewal* was a similar case. There, the appellant pleaded guilty to impaired driving. When he entered his plea, he thought his licence would only be suspended for one year. But, because he had one previous conviction that was

less than ten years old, his licence was automatically suspended for three years under the *HTA*. His lawyer did not discuss with him the *HTA* consequences of his plea, and, importantly, did not tell him that a guilty plea entered fourteen days later would only attract a one-year suspension under the *HTA* because, by that date, ten years would have passed since his last conviction. On the appellant's summary conviction appeal, McDermot J. held that the appellant's guilty plea was not informed and set it aside.

[25] On this appeal, it is unnecessary to endorse the result in *Stewart* or in *Grewal*. It is sufficient to say that I agree with the principle underlying each decision: an accused's unawareness of the collateral consequences of a guilty plea may render the plea uninformed. I do not believe that principle is foreclosed by the reasons of Doherty J.A. in *T.(R.)*.

[26] In *T.(R.)* my colleague said, at p. 519: "The plea must also be informed, that is the accused must be aware of the nature of the allegations made against him, the effect of his plea, and the consequences of his plea". Quick undoubtedly was aware of the nature of the allegations against him and aware of the effect of his plea – he would be giving up his right to a trial. He was also aware of the *Criminal Code* consequences of his plea. Thus, this appeal focuses narrowly on Quick's unawareness of the *HTA* consequences of his plea.

[27] In *T.(R.)* Doherty J.A. elaborated on the meaning of "consequences of his plea", at p. 523: "By an understanding of the consequences of his pleas, I mean the realization that convictions would flow from his pleas, as well as an appreciation of the nature of the potential penalty he faced." (emphasis added) In the next paragraph of his reasons he limited "consequences" to those that are "legally relevant".

[28] What flows from *T.(R.)* is that where, as in this case, an appellant raises the validity of a plea for the first time on appeal and claims the plea is uninformed, the appellant must show a failure to appreciate or an unawareness of a potential penalty that is legally relevant. *T.(R.)* does not define the ambit of penalties that may be legally relevant. But, I think legally relevant penalties would at least include penalties imposed by the state. Thus, non-criminal "penalties" imposed by the state for a *Criminal Code* offence would be "legally relevant".

[29] And for some accused the collateral or non-criminal consequences of a guilty plea to a criminal offence may have a more significant impact than punishment under the *Criminal Code*. So, for example, recently this court has suggested that an appellant's failure to understand the immigration consequences of a guilty plea under the *Criminal Code* may render the plea

uninformed: see *R. v. Aujla*, 2015 ONCA 325; and *R. v. Shiwprashad*, 2015 ONCA 577, 328 C.C.C. (3d) 191.

[30] In the appeal before us, there can be no doubt that the indefinite suspension of Quick's driver's licence under the *HTA*, though a collateral consequence of his plea, was a "legally relevant" penalty. The suspension was imposed by the state. Indeed, the standard caution given to Quick when he was arraigned on the dangerous driving charge told him that on his conviction his licence would be suspended under the *HTA*. And that suspension, though under a provincial statute, was imposed automatically on his *Criminal Code* conviction. Thus, I conclude that an accused's unawareness of a driver's licence suspension under provincial legislation for a *Criminal Code* driving offence is a clear example of a collateral consequence that may render a plea uninformed.

[31] This is not to say that an informed plea requires an accused to understand every conceivable collateral consequence of the plea, even a consequence that might be "legally relevant". Some of these consequences may be too remote; other consequences not anticipated by the accused may not differ significantly from the anticipated consequences; or, the consequence itself may be too insignificant to affect the validity of the plea.

[32] Even an accused's unawareness of the *HTA* consequences of a guilty plea to a driving offence under the *Criminal Code* in some cases may not render the plea uninformed. For example, suppose an accused pleaded guilty to a driving offence, unaware of the indefinite suspension of his or her licence that would automatically follow, but say for health reasons could never drive again. In such a case the collateral consequence of the plea would likely be too insignificant to render the plea uninformed.

[33] What is called for is a fact-specific inquiry in each case to determine the legal relevance and the significance of the collateral consequence to the accused. A simple way to measure the significance to an accused of a collateral consequence of pleading guilty is to ask: is there a realistic likelihood that an accused, informed of the collateral consequence of a plea, would not have pleaded guilty and gone to trial? In short, would the information have mattered to the accused? If the answer is yes, the information is significant. I draw support for this approach from the reasons of Lebel J. in *R. v. Taillefer*; *R. v. Duguay*, 2003 SCC 70; [2003] 3 S.C.R. 307 and the reasons of Watt J.A. in *R. v. Henry*, 2011 ONCA 289.

[34] In *Taillefer*; LeBel J. discussed the impact of the Crown's breach of its duty to disclose relevant evidence on the validity of an accused's guilty plea. When the non-disclosed evidence is tendered as fresh evidence on appeal, LeBel J.

held that the accused must demonstrate that "there is a reasonable possibility that the fresh evidence would have influenced his or her decision to plead guilty, if it had been available before the guilty plea was entered": *Taillefer*, at para. 90. He emphasized, however, that the test is objective. The question is not whether the accused would have declined to plead guilty, but whether a reasonable and properly informed person in the same situation would have done so: see also *R. v. Meehan*, 2013 ONSC 1782.

[35] Although I would follow the general approach in *Taillefer*, I would apply a subjective test, not an objective test. An informed plea requires that the accused pleading guilty be aware of the significant collateral consequence. In Quick's case, the question is whether the consequences of his plea he was unaware of would have mattered to him.

[36] In *Henry*, Watt J.A. also applied a subjective test when he set aside a guilty plea because the accused was misinformed about the viability of a constitutional challenge. And the standard he used was "realistic likelihood", not "reasonable possibility". Watt J.A. concluded at para. 37:

> Had the true state of affairs been communicated to the appellant, there was a realistic likelihood that he would have run the risk of a trial. In my opinion, under reasoning analogous to that applied in *Taillefer*; *Duguay*, the appellant should be given leave to withdraw his plea of guilty.

[37] In the case before us, using the standard in *Henry*, there is a realistic likelihood, Quick would not have pleaded guilty and would have asked for a trial had he known that on his conviction for dangerous driving his driver's licence would be automatically and indefinitely suspended. He is a truck driver, so, as he testified, his licence is his "livelihood". For him, the consequences of losing his licence indefinitely instead of for one year (as he was told), were undoubtedly significant. They were drastic. Had he not asked for a trial, at the very least he would have sought to postpone his plea for six months to take advantage of the ten-year limitation period in the *HTA*.

[38] In now asking that his plea be set aside Quick need not show a viable defence to the charge of dangerous driving. Whether he has a defence is irrelevant: "the prejudice lies in the fact that in pleading guilty, the appellant gave up his right to a trial." *R. v. Rulli*, 2011 ONCA 18 at para. 2.

[39] I thus conclude that Quick's unawareness when he pleaded guilty of the automatic indefinite suspension of his driver's licence under the *HTA*, rendered his plea uninformed. The answer to the question posed at the beginning of this

section – did Quick have to understand the *HTA* consequences of his guilty plea for his plea to be informed – is "yes".

[40] I add one final observation. The implication of answering "yes" to this question for the trial judge's mandatory plea inquiry under s. 606(1)(1.1) of the *Criminal Code* was not raised before us. Because this issue was not raised, it would not be appropriate to resolve it. I simply observe, that before an accused pleads guilty to a driving offence, a trial judge would be well advised to ensure that the accused understands the nature and length of any licence suspensions.

3. Should we quash all three convictions or only the conviction for dangerous driving?

[41] Quick submits that only his plea and conviction for dangerous driving should be set aside. Only his plea to dangerous driving was uninformed and therefore only the conviction on which it was based gives rise to a miscarriage of justice. The other convictions are not tainted. Thus, it would not be in the interests of justice to set aside those as well, especially as Quick has already served his sentence for those convictions.

[42] The Crown agrees with Quick's submission, and I do as well. I also agree with Quick's counsel that we have the jurisdiction to allow the appeal only on the conviction that resulted in a miscarriage of justice.

D. Conclusion

[43] Quick's guilty plea to dangerous driving was not informed because he was not aware of the indefinite suspension of his driver's licence that automatically followed under the *HTA*. Thus, his conviction for dangerous driving gives rise to a miscarriage of justice.

[44] I would allow Quick's appeal, set aside his guilty plea and conviction on the dangerous driving charge, and order a new trial on that charge.

Released: February 2, 2016 ("J.L.")

"John Laskin J.A."

"I agree. E.E. Gillese J.A."

"I agree. K. van Rensburg J.A."